Supreme Court, U.S.
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No. 96-2041

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DOROTHY BOYD, ET AL.,

Petitioners,

v.

CAROL M. BROWNER, ET AL.,

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

BRUCE J. TERRIS
1121 12th Street, NW
Washington, DC 20005
(202) 682-2100

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ARGUMENT

1. Plaintiffs' petition for a writ of certiorari requested, in the alternative, that either the writ be granted or that resolution of the petition be stayed until this Court decides *Oubre v. Entergy Operations, Inc.*, 1996 Term, No. 96-1291, which is being argued on November 12, 1997. Plaintiffs contended that the issue in *Oubre* is closely related to that in the present case.

Oubre involves the issue whether an employee can sue for wrongful termination under the Age Discrimination in Employment Act of 1967 ("ADEA") without tendering severance payments back to the employer. Defendants here contend that "the ADEA contains detailed provisions governing the validity of any purported waiver of the right to bring suit" and that *Oubre* "turns on matters of statutory construction related to those provisions * * *." Brief for the Respondents in Opposition ("Def. Opp."), p. 7. Defendants state that "[n]o analogous statutory text or congressional purpose is at issue here" and that the present case is "governed by principles of equity and common law." *Ibid.*

In fact, application of the tender-back doctrine in *Oubre* also turns on principles of equity and common law. The district court in *Oubre* held that, although the Older Workers Benefit Protection Act ("OWBPA"), codified at Section 7 of the ADEA, provides employees with certain protections that were not given to Oubre, Oubre's waiver was not void but merely voidable at Oubre's option. Because Oubre had not tendered back the severance paid to her as consideration for the waiver, the district court found that she had ratified the invalid waiver. The district court's decision to apply the common-law tender-back doctrine, which the appellate court affirmed without opinion, is therefore an application of equitable principles and common law, and does not turn on the language of the ADEA or congressional intent. Instead, the issue is whether application of the tender-back doctrine, as a condition

precedent to suit, nullifies the protective measures codified by Congress in the OWBPA.

Other employment discrimination cases underscore this point. This Court has held that a tender back of the amount paid for a release under the Federal Employees' Liability Act was not necessary to avoid a contract. *Hogue v. Southern Ry.*, 390 U.S. 516 (1968). Relying on *Hogue*, the Court of Appeals for the Eleventh Circuit has held that an employee need not tender back the amount paid for an ADEA release in order to challenge the release. *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036, 1041 (11th Cir. 1992). These cases were likewise decided on the basis of common-law principles, rather than particular statutory provisions.

Defendants further argue that *Oubre* turns on "the objectives underlying congressional enactment of the ADEA, including deterrence of employers from engaging in unlawful practices." Def. Opp. 7. However, the underlying statute in the present case is closely analogous. Section 804 of the Fair Housing Act, 42 U.S.C. 3604(a), is designed to provide a remedy for persons who have been subjected to unlawful discriminatory actions by the government and thereby to deter government officials from engaging in such activities in the future. Here, even more than in cases under the employment discrimination laws, a requirement that plaintiffs return the money they were paid before they can litigate would seriously undermine their ability to bring suit and thereby to deter defendants' allegedly illegal conduct. Indeed, here, since plaintiffs needed the money they received from defendants to buy other housing, the requirement imposed by the lower courts that plaintiffs repay these sums before their arguments

could even be heard meant that they were effectively denied any remedy.[1]

Defendants attempt to distinguish *Hogue v. Southern Ry.*, 390 U.S. 516 (1968), on the ground that there this Court stated that "requiring tender back would be 'wholly incongruous with the general policy of the Act' to provide injured employees a right to recover for injuries negligently inflicted by their employer." Def. Opp. 7-8. Here, it is just as incongruous with the remedial purpose of the Fair Housing Act to require repayment and thereby make it almost impossible for plaintiffs to remedy defendants' unconstitutional actions.

This Court's decision in *Oubre* is therefore likely to have a substantial bearing on the present case.

2. Defendants also argue that the decision of the court below "is consistent with the decisions of other courts of appeals holding that the equitable remedy of rescission cannot be afforded to parties who are unable or unwilling to surrender the benefits of the challenged contract and restore the status quo ante." Def. Opp. 8. However, none of the holdings in these cases involved the Fair Housing Act or turned on constitutional issues at all.

Moreover, the federal courts are split on whether rescission demands the return of the property received by the plaintiffs. In cases not cited by defendants, the courts have held that repayment is not required. "Where rescission occurs, restitution is *usually* the next step" (emphasis added). 1 Dobbs, *Law of Remedies*, § 4.3(6), p. 615. Thus, the courts have stated that the rule as to restitution is "to be applied in accordance

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[1] The only alternative would have been to try the issue as to only one plaintiff at a time and to have plaintiffs' counsel loan that plaintiff the money to make repayment to defendants.

with equitable principles." *Delta Investing Corp. v. Moore*, 366 F.2d 516, 520-521 (6th Cir. 1966). Accord, *Dermott Land and Lumber Co. v. Walter A. Zelnicker Supply Co.*, 272 F. 918, 920-921 (8th Cir. 1921) ("The rule that the party who seeks to rescind a contract shall return whatever he has received thereunder, like other rules of justice, must be applied in the practical administration of justice as shall best subserve in each particular case the undoing of wrong and the vindication of right."); *First National Bank & Trust Co. v. American Security and Trust Co.*, 437 F. Supp. 771, 774 (D.D.C. 1977).

Therefore, there is a conflict of circuits on this issue, and the writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons and those set forth in petition for a writ of certiorari, the petition for a writ of certiorari should be granted or this Court should delay ruling on the petition until the *Oubre* case is decided.

Respectfully submitted,

Bruce J. Terris

Attorney for Petitioners

October 6, 1997